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In the Supreme Court of the United States

OCTOBER TERM, 1967

JAMES V. SIDARY a/k/a JIM SIDNEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 4-11) is reported at 387 F.2d 698.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1967. A petition for rehearing was denied on February 12, 1968. On February 29, 1968, Mr. Justice White extended the time for filing a petition for a writ of certiorari to April 12, 1968, and the

petition was filed on March 20, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in this mail fraud case, the trial judge properly exercised his discretion in limiting the number of witnesses for the defense to be subpoenaed at government expense.

RULE INVOLVED

Rule 17(b), Federal Rules of Criminal Procedure, in effect until July 1, 1966, provided in pertinent part:

> The court or a judge thereof may order at any time that a subpoena be issued on motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness, and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. * * *

Rule 17(b), Federal Rules of Criminal Procedure, effective July 1, 1966, provides in pertinent part:

> The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon

a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. * * *

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner (who was tried with four others) was convicted on fourteen counts charging him with mail fraud in the sale of Hereford cattle (18 U.S.C. 1341).[1] On April 18, 1966, he was sentenced to eighteen months' imprisonment on each count, the sentences to run concurrently and to be subject to the provisions of 18 U.S.C. 4208 (a) (2).

The government's case consisted of the testimony of eighty witnesses, of whom approximately half were former customers of petitioner and his codefendants. This evidence, the sufficiency of which is not in issue, showed that petitioner was the office manager of a cattle business owned and controlled by codefendants. The business, Speers Hereford Farms,[2] which had its offices in Kansas and "farms" in Pennsylvania and Utah, solicited inquiries for its Hereford cattle through advertisements in livestock journals (*e.g.*, G. Exh. 10). When inquiries were received, petitioner would send out letters and brochures (*e.g.*, G. Exh. 71), representing the weight and quality of the cattle being offered for sale. In addition, petitioner and

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[1] He was found not guilty of conspiracy to commit the above offenses.

[2] The name was later changed to American Hereford Farms.

other employees of the company made direct representations that the cattle to be sold were produced on their "farms" from their own herd, or from neighboring farms using the company's breeding stock (*e.g.*, Tr. 131, 169, 348),[3] and that the cattle were purebred Herefords (*e.g.*, Tr. 958, 1089-1090, 1255). In fact, the cattle were not purebred Herefords,[4] were underweight and often diseased; they were purchased by petitioner and his codefendants at livestock auctions and merely sent to the "farms" for a few days to await reshipment.

The defense interposed was that of good faith. Fourteen witnesses, of whom five were satisfied customers, testified for the defendants. Letters from eighteen satisfied customers—alleged to be "just a representative group"—were introduced in evidence (Tr. 2845). In addition, an accountant, who had examined the records of the company for the year May 1962-1963, testified that only about twelve percent of the purchasers, representing approximately ten percent of the cattle sold, had made written complaints to the company concerning the cattle (Tr. 2748-2750).[5]

Prior to trial, petitioner joined in a motion made by two codefendants to subpoena eighty-nine wit-

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[3] "Tr." refers to the transcript of trial proceedings, lodged with the Clerk of this Court.

[4] Some were not even part Hereford (*e.g.*, Tr. 180, 364, 454).

[5] The cattle sold for the year as to which the accountant testified numbered around thirty-five thousand, and the gross receipts were $3,329,000.

nesses at government expense. Attached to the motion was an affidavit setting forth, *inter alia*, the expected substance of the witnesses' testimony. Requested were three veterinarians who would testify to the care that the cattle received prior to shipment, two cattle buyers who would testify that the defendants never purchased substandard or diseased cattle, three truckdrivers and a herdsman who would testify to defendants' efforts to assure healthy delivery of the cattle, and eighty witnesses from all over the country who would testify that they were saisfied customers of defendants (R. 55-61). The trial judge granted the motion as to the veterinarians and cattle buyers, but denied it as to the truckdrivers and herdsman. He permitted the defense to subpoena five of the allegedly satisfied customers: two from Kansas, and one each from Missouri, Iowa, and Nebraska. In addition he permitted the defendants to subpoena at government expense the accountant who had examined the books of the defendants' companies. The motion to subpoena an additional seventy-five allegedly satisfied customers was denied (R. 140-141).

ARGUMENT

Petitioner contends that under the Sixth Amendment the trial judge was without discretion to deny the motion to subpoena eighty satisfied customers at government expense and that in any event the ruling was an abuse of discretion.

It is, however, well-settled that a district judge has discretion under Rule 17(b), F.R. Cr. P. to refuse to permit certain witnesses to be subpoenaed at the ex-

pense of the government.[6] *E.g.*, *Taylor* v. *United States*, 329 F.2d 384, 386 (C.A. 5); *Reistroffer* v. *United States*, 258 F.2d 379, 396 (C.A. 8), certiorari denied, 358 U.S. 927; *Murdock* v. *Untied States*, 283 F.2d 585, 587 (C.A. 10), certiorari denied, 366 U.S. 953; *Feguer* v. *United States*, 302 F.2d 214, 241 (C.A. 8), certiorari denied, 371 U.S. 872. The principal purpose of endowing the district judge with discretion is to empower him to curtail abuses by defendants of the right to summon witnesses for their defense at the government's expense. Here the calling of eighty satisfied customers would clearly have been an abuse. Evidence that there were satisfied customers, while legally relevant on the issue of fraudulent intent, nevertheless bears collaterally, rather than directly, on that issue. See *Worthington* v. *United States*, 64 F.2d 936 (C.A. 7). Although the failure to permit the defense to introduce any such testimony might be error, *United States* v. *Shavin*, 287 F.2d 647 (C.A. 7), it is well established that the number of satisfied-customer witnesses that a defendant may call, even at his own expense, may be limited in the interests of sound judicial management. *Chapa* v. *United States*, 261 Fed. 775 (C.A. 5), certiorari denied, 252 U.S. 583; *Samuels* v. *United States*, 232 Fed. 536 (C.A. 8); cf. *Burgman* v. *United States*, 188 F.2d 637, 641-642 (C.A.D.C.), certiorari denied, 342 U.S. 838. The limitation to five such wit-

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[6] As the court of appeals noted (Pet. App. 8), nothing in amended Rule 17(b), effective July 1, 1966, indicates that the trial court's discretion in this regard was intended to be diminished.

nesses from surrounding states, whom petitioner and his codefendants might subpoena at government expense, was not unreasonable.

The jury was apprised, from the letters of satisfied customers introduced, and from the testimony of the accountant, that many of defendants' customers apparently found no cause for complaint. The evidence thus adequately placed before the jury the issue whether there was a scheme to defraud.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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